Filed 4/23/12 P. v Smith CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMELL SMITH, Defendant and Appellant.	B231784 (Los Angeles County Super. Ct. No. TA112612)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ricardo R. Ocampo, Judge. Affirmed as modified.

Kimberly Howland Meyer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Jamell Smith challenges his conviction for attempted kidnapping. The evidence at trial showed that Smith tried to abduct a four-year-old girl from her front yard, but was foiled by the child's older brother. On appeal, Smith argues that (1) the jury's verdict is not supported by substantial evidence; (2) the trial court erred by failing to give a sua sponte instruction on attempted false imprisonment; and (3) the court made errors in calculating his days of credit and imposing a DNA penalty assessment. Smith's technical challenges to his sentence have merit. In all other respects, we affirm the judgment.

FACTS

On the evening of June 1, 2010, nine-year-old Deandre A. was playing in the yard in front of his home, along with his four-year-old sister Brianna S. Their parents were inside the home, near the front window, where they could hear the children playing outside. Deandre saw a stranger sitting nearby, holding a puppy. The man had been there for hours, since the children walked by him on their way home from school. Deandre testified that the man with the puppy was "just looking at my sister," or "eyeballing her" for at least 10 minutes while the children played.

The man urged his puppy to approach Brianna, and he followed after the dog. Brianna testified that "he snatched me" after first telling her, "I got something special for you." According to Deandre, the man grabbed Brianna with both arms, "like he was hugging her," and "lifted her up" so that her feet left the ground. After grabbing Brianna, the man picked up the puppy. He backed up four feet, toward a gate to exit the area where the children were playing. Deandre thought the man "was getting ready to run."

Deandre heard Brianna say repeatedly, in a loud voice, "Let me go. Stop. Stop." She was crying and screaming. The man responded by saying, "I love you. I love you." He was slurring his words. Deandre tackled the stranger and began pulling on Brianna's sweater, "to get my sister away from the bad man." As he jumped on the man, all three of them fell backward onto the grass. Even after falling, the man clung tightly to Brianna. He put his leg over Deandre's neck, grabbed Deandre's shirt collar, and pulled the boy toward him. Deandre felt that the man was threatening him and Brianna during the incident. Both children testified that they were scared.

The children's parents, Brian S. and Annette M., heard a ruckus. Brianna was screaming and crying "Daddy." When he looked outside, Brian S. saw a man (who he identified at trial as appellant) on the ground, holding Brianna, Deandre, and a dog. Annette M. also identified appellant as the man she saw "holding my babies down." The children were trying to escape appellant's grasp, and Deandre was pulling on Brianna's jacket. To Brian S., "[i]t looked like he was trying to take my kids." Brian S. pushed appellant and the children rolled out of appellant's arms. Appellant did not let go of Brianna and Deandre until their father intervened. Afterward, appellant said "I love you" to Brian S.

When the police arrived at Brian S.'s home, in response to a 911 emergency call, appellant was still sitting there. Brianna was crying and fearful, and Deandre was scared speechless. Appellant did not smell of alcohol, did not slur his words, and was coherent. He lives 10 to 15 city blocks away from Brian S.'s residence.

PROCEDURAL HISTORY

Appellant was charged with two counts of attempted kidnapping. At the close of the prosecution's case, the court granted appellant's motion to dismiss count 2, alleging an attempt to kidnap Deandre. The jury found appellant guilty of the attempted kidnapping of Brianna, and found true the allegation that the victim was under the age of 14. Appellant was found ineligible for probation, and sentenced to one-half of the upper term, totaling five years six months in prison.

DISCUSSION

1. Sufficiency of the Evidence Showing an Attempt to Kidnap

Appellant contends that "[n]o evidence was presented at trial on the essential element for attempted kidnapping that appellant harbored the specific intent to move the victim a 'substantial distance.'" Viewing the appeal in the light most favorable to the judgment, we determine whether the record contains substantial evidence upon which a reasonable jury could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319; *People v. Johnson* (1980) 26 Cal.3d 557, 575-578; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) We do not re-

evaluate the credibility of the witnesses, and we must presume the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Avila* (2009) 46 Cal.4th 680, 701; *People v, Kraft* (2000) 23 Cal.4th 978, 1053; *People v. Koontz* (2002) 27 Cal.4th 1041, 1078.)

The jury was instructed on the elements of simple kidnapping and the elements of attempt.[1] In an attempted kidnapping, the prosecution must show that the defendant intended to move the victim some appreciable distance before abandoning the effort. "[T]he distance [the victim] was moved is immaterial—asportation simply is not an element of the offense." (*People v. Cole* (1985) 165 Cal.App.3d 41, 50.) The defendant's intent to move the victim must usually be inferred from circumstantial evidence. (*Id.* at p. 48; *People v. Davis* (2009) 46 Cal.4th 539, 606.) For example, in *People v. Fields* (1976) 56 Cal.App.3d 954, this court upheld a conviction of attempted kidnapping even though the victim was never physically moved: the attempt was abandoned when the victim threatened to scream after the defendant grabbed her by the hair and told her to get into his car. (*Id*. at p. 956.) "In the absence of any evidence to suggest that defendant contemplated no more than a trivial movement of his victim, the requisite intent to kidnap may be inferred." (*Id.* at p. 957.)

Appellant spent considerable time "eyeballing" Brianna before approaching her. He "snatched" Brianna, lifting her off the ground. He tried to soothe the crying, screaming child by telling her "I love you," ignoring her demands to be let go. After collecting his puppy, appellant headed toward an exit gate: Deandre thought appellant "was getting ready to run" down the street with Brianna clutched in his arms. (See

---

1 "The defendant is charged in count 1 with attempted kidnapping. To prove that the defendant is guilty of this crime, the People must prove that: one, the defendant took a direct but ineffective step towards committing kidnapping; and, two, the defendant intended to commit kidnapping." "To prove that the defendant is guilty of kidnapping, the People must prove that: one the defendant took, held or detained another person by using force or by instilling reasonable fear; two, using that force or fear, the defendant moved the other person a substantial distance; and, three, the other person did not consent to the movement."

People v. Dillon (1983) 34 Cal.3d 441, 455 [if "any rational person would believe a crime is about to be consummated absent an intervening force, the attempt is underway . . ."].) Appellant did not release Brianna even after Deandre tackled him and they fell onto the lawn, clinging tightly to Brianna while Deandre tried to pull his sister to safety. As Brian S. saw it, appellant "was trying to take my kids." Appellant did not relinquish his hold on Brianna until forced to do so by Brian S. The children were petrified with fear.

The jury could reasonably infer that appellant intended to kidnap Brianna based on: his planning activity in observing the child at play; his ruse to gain the child's trust with his puppy, with his promise to give her "something special," and with his assurances of affection; his forceful grabbing of the child and refusal to let go despite her pleas to be released; his movements toward the exit gate with Brianna in his arms; and the proximity of his residence to the victim's home. The jury could credit Deandre's testimony that appellant was ready to flee with Brianna, prompting Deandre to jump on appellant to stop the kidnapping. Appellant did not abandon his efforts to take Brianna until forced to do so by an adult male. This was, beyond a reasonable doubt, a kidnapping attempt.

2. <u>Attempted False Imprisonment Instruction</u>

Appellant did not request—and the trial court did not give—an instruction on attempted false imprisonment.[2] False imprisonment "is the unlawful violation of the personal liberty of another" (Pen. Code, § 236); i.e., "restraint of a person's *freedom of movement*." (*People v. Bamba* (1997) 58 Cal.App.4th 1113, 1121.) Appellant argues that "although the evidence presented at trial was legally insufficient to convict appellant of attempted kidnapping, there was substantial evidence to support jury instructions on

---

[2] The instruction on false imprisonment states, "To prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant intentionally [and unlawfully] restrained, confined, or detained someone; and 2. The defendant made the other person stay or go somewhere against that person's will." (CALCRIM No. 1240.) An attempted false imprisonment does not require a present ability or personal presence, though it does require a specific intent to commit the crime. (*People v. Ross* (1988) 205 Cal.App.3d 1548, 1554.)

the lesser included offenses of misdemeanor and felony attempted false imprisonment." He maintains that the trial court had a duty to instruct the jury on the crime of attempted false imprisonment as a lesser included offense of attempted kidnapping.

A lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the information include all of the elements of the lesser offense, so that the greater offense cannot be committed without also committing the lesser offense. (*People v. Birks* (1998) 19 Cal.4th 108, 117; *People v. Rundle* (2008) 43 Cal.4th 76, 143.) Respondent concedes that a person who has the specific intent to detain and move a victim, as required for an attempted kidnapping, also has the specific intent to restrain the victim's personal liberty, as required for an attempted false imprisonment. It is well established that false imprisonment is a lesser included offense of kidnapping: "He who kidnaps a victim does so in order to restrain the personal liberty of his victim (Pen. Code, § 236), whatever his purpose may be for the false imprisonment (to rape, to rob, to obtain ransom, etc.)." (*People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 820-821.)[3]

Even if attempted false imprisonment is a lesser included offense of attempted kidnapping, a sua sponte instruction on false imprisonment "is not required where the evidence establishes that defendant was either guilty of kidnapping or was not guilty at all." (*People v. Ordonez, supra,* 226 Cal.App.3d at p. 1233. See also, *People v. Vargas* (2001) 91 Cal.App.4th 506, 546 and *People v. Morrison* (1964) 228 Cal.App.2d 707, 713 [the trial court need not instruct on a lesser included offense if the evidence is such that the defendant, if guilty at all, was guilty of something beyond the lesser offense].) The trial court must instruct on a lesser included offense "if there is substantial evidence the

---

3 See also *People v. Magana* (1991) 230 Cal.App.3d 1117, 1120-1121; *People v. Shadden* (2001) 93 Cal.App.4th 164, 171; *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1233; *People v. Patrick* (1981) 126 Cal.App.3d 952, 965; *People v. Gibbs* (1970) 12 Cal.App.3d 526, 547; and *People v. Chacon* (1995) 37 Cal.App.4th 52, 65.

defendant is guilty *only* of the lesser." (*People v. Birks, supra,* 19 Cal.4th at p. 118, italics added.)

The evidence in this case does not support a theory that defendant was guilty *only* of attempted false imprisonment. Appellant exercised physical force in snatching up Brianna and clutching her to him, refusing to release her despite her tears, screams, and pleas to "let me go." Appellant collected his dog and moved purposefully toward an exit gate, getting ready to run away with Brianna in his arms. The kidnapping was thwarted by Deandre. There was no substantial evidence that appellant planned to remain in Brian S.'s yard, merely holding Brianna there in his arms, against her will. The evidence showed that appellant picked up Briana in an attempt to move the child a substantial distance, i.e., to his home 10 or 15 blocks away, by reasonable inference.

3. Conduct Credit

Appellant contends that his conduct credits were not properly calculated. At sentencing, he received 333 days of presentence custody credit, consisting of 290 days of actual custody and 43 days of conduct credit. Respondent concedes that appellant did not receive enough conduct credit because the trial court treated the conviction as a "violent felony" under Penal Code section 2933.1, which limits conduct credit for violent felonies. Attempted kidnapping is not a violent felony. (Pen. Code, § 667.5, subd. (c).) Appellant should be deemed to have served a term of four days for every two days spent in actual custody. (Pen. Code, § 4019, subd. (f); *People v. Fry* (1993) 1334, 1340-1341.) As a result, his conduct credit is 144 days, for a total of 434 days of presentence credit.

4. DNA Penalty Assessment

The trial court imposed a $20 DNA penalty assessment, as well as a $200 restitution fine, and a $200 parole restitution fine. A DNA penalty cannot be levied on "any restitution fine." (Gov. Code, § 76104.7, subd. (c)(1).) Because the court only imposed restitution fines, no DNA assessment is allowed.

DISPOSITION

The judgment is modified to reflect conduct credit of 144 days, plus 290 days of actual custody, for a total of 434 days of precommitment credit. The judgment is also

modified to strike the $20 DNA penalty assessment. As so modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.